SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-686
73-687

TELEPHONE USERS ASSOCIATION, INC., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
and
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, *Respondents.*

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR THE PUBLIC SERVICE COMMISSION IN OPPOSITION

C. FRANCIS MURPHY
Corporation Counsel, D.C.

C. BELDEN WHITE, II
Assistant Corporation Counsel, D.C.

LINUS H. DEENY
Assistant Corporation Counsel, D.C.

Attorneys for Respondent,
Public Service Commission
Suite 204, 1625 I Street, N.W.
Washington, D.C. 20006

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA IN OPPOSITION

OPINIONS BELOW

The decision of the District of Columbia Court of Appeals presented in Docket No. 73-686 is reported at 304 A.2d 293 (1973). (Appendix to Petition in No. 73-686, pp. 1-20). The decision of the District of Columbia Court of Appeals presented in Docket No. 73-687 is unreported. (App. to Petition in No. 73-687).

QUESTION PRESENTED

The question presented is identical in both cases:

Was not the District of Columbia Court of Appeals correct in dismissing petitioner's appeals from orders of the Public Service Commission of the District of Columbia (PSC or Commission) on the ground that petitioner lacked standing where the record plainly showed that petitioner in both cases had failed to allege and prove that petitioner had paid telephone bills itself and therefore was not a person affected by the PSC orders appealed from?

STATEMENT OF THE CASES

Case No. 73-686 in this Court commenced before the PSC as Formal Case No. 570 with the filing by The Chesapeake and Potomac Telephone Company (C&P) of a petition for an increase in its rates. Petitioner was granted intervention and C&P's request, after full hearing, was in part granted by the Commission and such orders were then appealed by petitioner Telephone Users Association, Inc. (TUA) and became Case No. 6819 in the District of Columbia Court of Appeals (DCCA), which appeal was dismissed on the ground that TUA had no standing to appeal within the purview of Sec. 43-705, D.C. Code, 1973, because TUA failed to show it will be "affected by" the PSC's order to a legally cognizable extent. Petition to this Court followed.

Case No. 73-687 in this Court had its genesis before the PSC as Formal Case No. 585 in a C&P petition to immediately raise C&P's rates to compensate C&P for the Congress' increasing of the District of Columbia gross receipts tax on Public Utilities from 4% to 5%. Petitioner was granted intervention on the same grounds as in Formal Case No. 570, but in neither case in its petition to intervene did TUA allege or offer to produce evidence that it was then paying for the alleged use of a telephone. C&P's request, after full hearing, was granted, and the PSC orders were appealed and became case No. 7126 in the

DCCA, which Court subsequently granted C&P's motion to dismiss TUA's appeal on the ground that petitioner had no standing to appeal. TUA then petitioned this Court.

It should be noted that the fact that the PSC grants a petition to intervene in no way can be taken to mean, as TUA alleges, that the PSC has found that TUA would be affected by any final PSC order. Rule 7.4 of the PSC Rules of Practice and Procedure specifically contradicts such a conclusion in the following language:

> Rule 7.4 . . . However, the granting of such a petition [of intervention] shall not constitute a determination by the Commission that the intervenor is or will be affected by its final order or decision.

It is to be noted that TUA alleges that the order of the Court below in DCCA No. 7126 was invalid because the DCCA failed to make findings of fact as required by Sec. 43-705, D.C. Code, 1973. This observation is completely without merit because the DCCA had just written a lengthy decision in TUA's companion case DCCA No. 6819 in which its findings on which dismissal was granted were fully set forth—and since the basis for TUA's intervention in PSC Formal Case No. 585 was, by its own request, based upon the facts alleged in its petition to intervene in PSC Formal Case No. 570, a repetition in DCCA No. 7126 of the found facts in DCCA No. 6819 would be superfluous.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner Has Failed To Present Any Question Warranting The Exercise Of This Court's Discretionary Jurisdiction To Review On Writ Of Certiorari

Contrary to the command of subparagraph (h) of paragraph 1 of the Court's Rule 23, neither petition for a writ of certiorari contains "[a] direct and concise argument

amplifying the reasons relied on for the allowance of the writ". Petitioner nowhere indicates which, if any, of the "special and important reasons" set forth in Rule 19 it believes justify the granting of the petitions.

In its "Reasons for Granting the Writ" on page 8, TUA cites *Sierra Club* v. *Morton,* 405 U.S. 727, and *Bebchick* v. *Public Utilities Commission,* 115 U.S. App. D.C. 232-3, 318 F.2d 203, 4, and *Williams* v. *WMATC,* 134 U.S. App. D.C. 342, 415 F.2d 922, ostensibly for the reason that these cases conflict with the DCCA decisions in the cases on appeal and therefore could possibly be said to come within the ambit of this Court's Rule 19(b).

TUA argues that the Sierra Club case has been somehow bypassed by the DCCA in its dismissal of its appeals. Counsel for PSC are at a loss to see how this conclusion could be reached. The DCCA action is directly in point with Sierra's results. This Court in that case specifically held that unless a petitioner alleges and demonstrates "injury in fact" he lacks standing to judicially challenge an administrative agency's action. It is true that Sierra was concerned with the Federal Administrative Procedure Act and the instant cases concern interpretation of Sec. 43-705, D.C. Code, 1973, but the results should be identical. In the DCCA No. 6819 opinion[1] the Court at pages 4 and 5 of the slip opinion specifically stated:

> We have no doubt that one who alleges that he uses *and pays for* telephone service would be affected by any order increasing telephone rates (citation omitted). However, this record does *not* contain any allegation or evidence that TUA, as contrasted with its attorney, is itself *paying* for the telephone it uses or otherwise has a "direct stake in the outcome" of this proceeding. *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). See *Winston*

[1] 304 A2d 293 (1973)

> v. *Zoning Board of Appeals*, 407 Ill. 588, 95 N.E. 2d 864, 868-69 (1950). We conclude that TUA has failed to show it will be "affected by" the Commission's order to a legally cognizable extent. Accordingly, we are precluded from reviewing TUA's appeal and its petition must be dismissed. [Footnotes omitted]

This reasoning is on all fours with Sierra.

With regard to the Bebchick and Williams cases, TUA seeks to show a conflict with the DCCA decisions in the instant cases, but it must be pointed out that fare payment in the coin box in the transit cases was assumed by the Court in that no one questioned it. In DCCA No. 6819, after decision by the Court, TUA alleged for the first time that TUA also uses public phones and pays in the coin box. Let this be assumed to be correct for sake of argument. These assumed facts do not change the results in the instant cases because the rate orders appealed from include *no change whatever* in the public phone rate, and therefore TUA cannot be affected by that rate so as to bring itself within the ambit of Sec. 43-705, D.C. Code, 1973.

The record in the appealed cases does not disclose any ground for review conceivably falling within the standards and consideration governing review on writ of certiorari prescribed by Rule 19 of this Court. These cases involve nothing more than the finding by the DCCA, that TUA, as a matter of fact and based on the record, does not have standing to appeal because it is not a person affected by the appealed PSC orders, as is required by Sec. 43-705, D.C. Code, 1973. If this be a basis for granting certiorari, i.e., a factual conflict between petitioner and the Court below, then all such petitions should be granted because the very essence of an appeal is, in part, a dispute as to the application or non-application of facts in the case. To enunciate this conclusion is to show its erroneousness.

In no sense, then, can these cases be viewed as presenting a question of a magnitude sufficient to warrant the exercise of this Court's jurisdiction to review on writ of certiorari.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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